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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1940

No. 575

**PRODUCERS PIPE LINE COMPANY, a Corporation,**  
**Petitioner,**

**vs.**

**JAMES W. MARTIN Commissioner of Revenue for the**  
**Commonwealth of Kentucky and KENTUCKY TAX**  
**COMMISSION, Etc.,**  
**Respondents.**

**Petition for Writ of Certiorari to the United States Circuit**  
**Court of Appeals for the Sixth Circuit and**  
**Brief in Support Thereof**

**R. MILLER HOLLAND,**  
**ARTHUR D. KIRK,**  
**WILBUR K. MILLER,**  
**Owensboro, Ky.,**  
**Attorneys for Petitioner.**

**CARY, MILLER & KIRK,**  
**Owensboro, Kentucky,**  
**Of Counsel.**

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## OCTOBER TERM, 1940

No. \_\_\_\_\_

V.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH  
CIRCUIT AND BRIEF IN SUPPORT THEREOF

The petitioner, Producers Pipe Line Company, a Delaware corporation having its office in Owensboro, Kentucky, prays that a writ of certiorari issue to review the decree filed June 7, 1940, in the above entitled cause in the United States Circuit Court of Appeals for the Sixth Circuit.

SUMMARY AND STATEMENT OF THE  
MATTER INVOLVED

This action was instituted on July 29, 1937, when the petitioner as complainant filed its bill in equity in the United States District Court for the Western District of Kentucky against the respondents as defendants, seeking to enjoin the respondents from imposing upon petitioner for the year 1936, a tax under the provisions of Section 4077 of the Kentucky Statutes, Carroll's 1936 Edition, page 2139 (R. 3).

The pertinent portion of Section 4077 is as follows:

"Every railway company or corporation, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, bus line company, palace car company, dining car company, sleeping car company, chair car company, tank car company, coal car company, pipe line company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town, and taxing district, wherein its franchise may be exercised."

The petitioner, Producers Pipe Line Company, is a Delaware corporation having its principal operating office in Owensboro, Kentucky. It purchases crude petroleum at the wells of producers in five counties in western

Kentucky. The oil is purchased in a competitive market. The petitioner owns a pipe line through which it transports the oil so purchased to the Ohio River at a point near Owensboro. From that point, the oil is transported by means of barges and towing equipment owned and operated by the petitioner, to Louisville, Kentucky, where it is sold to Louisville Refining Company, which takes the petitioner's entire output. The petitioner's pipe line and river equipment are used for no purpose except to transport the oil purchased by it.

The movement of petitioner's oil is wholly within Kentucky, so its business is completely intrastate.

The petitioner constructed its pipe line on a right of way acquired by purchase from the landowners. It has never exercised, nor attempted to exercise, nor has it ever claimed the right to exercise, the right of eminent domain. It does not employ the facilities of any common carrier. Petitioner does not transport oil belonging to others, and has never held itself out as a common carrier. In the five Kentucky counties traversed by the petitioner's pipe line, the line crosses under various county roads and state highways. In three of those counties the petitioner obtained the privilege of placing its pipe under the county roads in the manner prescribed in Section 164 of the Constitution of Kentucky. The privileges so obtained from the counties are not exclusive.

Section 164 of the Constitution is as follows:

"No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such privilege or franchise for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly,

and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

The "franchise" or right to place the pipe line under the county roads was not obtained in the other two counties, probably because of oversight on the part of the petitioner's management. In every instance where the pipe line crosses under a state highway, a permit for the crossing was issued by the Highway Department of Kentucky.

In the bill of complaint filed in the District Court (R. 3) the ground for injunctive relief relied upon by the petitioner was that Section 4077 of the Kentucky Statutes does not apply to all corporations, but only to such as have a special or exclusive privilege not allowed by law to natural persons or which perform a public service; that, although "pipe line companies" are among the kinds of companies enumerated in the statute, the petitioner is not subject to the tax because it does not have any "special privilege or franchise not allowed by law to natural persons", and does not perform any public service, even though its corporate name denominates it as a "pipe line company", and even though it owns and uses in its private business a line of pipe.

On December 15, 1937, the petitioner filed in the District Court an amended and supplemental bill, in which it alleged that it purchases oil under competitive conditions and that no producer is under any sort of compulsion to sell his oil to the petitioner. (R. 16.)

The respondents, defendants in the District Court, having filed on September 21, 1937, a motion to dismiss the complaint (R. 15) and having filed on December 29, 1937, a motion to dismiss the complaint as amended (R. 18), the cause was submitted for judgment on those mo-

tions to Hon. Elwood Hamilton, the District Judge.

Judge Hamilton filed his opinion on February 8, 1938, (R. 19). The opinion is reported in 22 F. Supp. 44. The District Court overruled the motion to dismiss (R. 25). It held that Section 4077 is not applicable to every corporation (R. 20). It decided that, while Section 4077 enumerates several types, among which is "pipe line company", it is not intended by its terms to tax all corporations, but only those exercising some special or exclusive privilege not allowed by law to natural persons or performing some public service.

The District Court held that the public has no right to the use of the pipe line owned and operated by the petitioner and that it could not be compelled to allow any person producing oil in the field to use it (R. 24), and it pointed out that there is no statutory law in Kentucky giving the public the right to use the petitioner's pipe line independent of its permission (R. 25). Finally, the District Court decided that the record shows that the petitioner is carrying on a private business, and that the public has no interest whatever in its operations. It held that, as the petitioner does not possess or exercise any special or exclusive privilege or franchise not allowed by law to natural persons and does not perform any public service, it is not subject to assessment under the statute. (R. 25).

Following the order overruling the motions to dismiss, the case was tried on its merits before District Judge Swinford, who had succeeded Judge Elwood Hamilton upon the latter's appointment to the Circuit Court of Appeals for the Sixth Circuit. District Judge Swinford filed on December 1, 1938, findings of fact and conclusions of law (R. 102) and on the same date a decree was entered granting to the petitioner a permanent injunction in accordance with the prayer of its bill (R. 107).



The case was appealed by the respondents to the United States Circuit Court of Appeals for the Sixth Circuit where it was argued and submitted on May 8, 1940. (R. 113).

On June 7, 1940, the United States Circuit Court of Appeals filed a decree reversing the decree of the District Court, (R. 113). On the same date an opinion was filed by Judges Simon, Allen and Arant, Judge Allen writing. (R. 114).

The United States Circuit Court of Appeals held that the petitioner, who was the appellee in that court, falls within the companies enumerated in Section 4077, because the statute expressly names "pipe line company" (R. 115). It decided that the petitioner falls within the statutory description of those corporations which have or exercise a special or exclusive privilege or franchise not allowed by law to natural persons (R. 118). The Circuit Court held that under Section 3766b-1 of Carroll's Kentucky Statutes, the petitioner is vested with the power of eminent domain (R. 118), (Section 3766b-1 is reproduced in the appendix).

It determined that the franchises granted by the counties to build pipe lines under county roads and the permits to construct pipe lines under state highways, gave to the petitioner special and exclusive privileges within the meaning of Section 4077. It held that the privileges are exclusive for the reason that no one else may use the petitioner's pipe line (R. 119).

#### QUESTIONS PRESENTED

1. Whether a small, private corporation which purchases crude petroleum at the wells of producers in a

competitive market, and which transports such oil through its own pipe line constructed on a right of way acquired by purchase, and by river by means of its own barges and towing equipment, to one purchaser, an oil refinery, to which it sells all the oil so purchased, (the entire movement being intrastate, and the corporation using its pipe line and river equipment for no other purpose and having never transported oil for others, and not being engaged in any sort of public service) is subject to the tax imposed by Section 4077 of the Kentucky Statutes, Carroll's 1936 Edition, page 2139.

2. Whether the franchise or privilege granted under Section 164 of the Constitution of Kentucky by the governing body of a Kentucky county, to introduce a pipe line under a county road, is a "special or exclusive privilege or franchise not allowed by law to natural persons", as that term is used in Section 4077 of the Kentucky Statutes, so as to make its holder subject to the tax imposed thereby.

3. Whether Section 3766b-1 of Kentucky Statutes, Carroll's 1936 Edition confers the right of eminent domain upon a corporation which is not engaged in public service. Section 3766b-1 is reproduced in the appendix.

#### STATEMENT DISCLOSING BASIS OF JURISDICTION

1. This Court has jurisdiction to review the decree in question under 28 U. S. C. A. 347(a), (Judicial Code, Section 240, as amended).

2. The decree sought to be reviewed was filed by the

United States Circuit Court of Appeals for the Sixth Circuit on June 7, 1940. (R. 113).

3. Although the decree sought to be reviewed was filed June 7, 1940, the statutory period within which to make application to this Court for a writ of certiorari is not to be computed from that date. Seasonably, and on July 3, 1940, the petitioner applied to the Circuit Court of Appeals for a rehearing. The petition therefor was denied by that Court on October 9, 1940. The latter is the date from which the statutory time within which to file this petition for a writ of certiorari is to be computed.

#### REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, in that

(a) The Circuit Court of Appeals held that Section 4077 applies to a corporation not engaged in public service, and practically admitted a conflict with the following Kentucky decisions:

*Louisville Tobacco Warehouse Co. v. Commonwealth*, 106 Ky. 165.

*Commonwealth v. Walsh's Trustee*, 133 Ky. 103.

(b) The Circuit Court of Appeals held that certain privileges granted to and exercised by the petitioner are "special and exclusive" within the meaning of Section 4077, although it admitted that petitioner does not engage in public service. This conflicts with Section 3 of the Constitution of Kentucky which forbids the grant of

a special or exclusive privilege except in consideration of public service. It conflicts also with

*Louisville Railway Co. v. Louisville Fire & L. P. Ass'n*, 151 Ky. 644

and numerous other Kentucky decisions construing Section 3.

(c) The Circuit Court of Appeals held that the petitioner has the right of eminent domain, although it recited the facts as showing that petitioner is engaged in a private business. This conflicts with Sections 13 and 242 of the Constitution of Kentucky and with

*Riley v. L. H. & St. L. Railway Co.*, 142 Ky. 67.

These constitutional sections appear in the appendix.

For these reasons it is respectfully submitted that this petition should be granted.

PRODUCERS PIPE LINE COMPANY.

by R. Miller Holland,  
Arthur D. Kirk,  
Wilbur K. Miller,  
Owensboro, Kentucky,  
Attorneys.

Cary, Miller & Kirk,  
Owensboro, Kentucky,  
Of Counsel.